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BUMBO (PTY) LIMITED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WENDY D. WHITSON, individually and
on behalf of all others similarly situated,

Plaintiffs,

vs.

BUMBO, BUMBO LIMITED, BUMBO
(PTY) LTD., and TARGET
CORPORATION,

Defendants.

Case No. CV-07-5597 MHP

**OPPOSITION OF BUMBO (PTY)
LIMITED TO PLAINTIFF WENDY
D. WHITSON *ET AL.*'S
ADMINISTRATIVE MOTION
REQUESTING AN ORDER
DESIGNATING MANNER OF
SERVICE; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: (No Hearing Date Set)

[Declaration of Jeffrey M. Bortz; and
Proposed Order filed separately and
concurrently herewith]

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Plaintiffs Wendy D. Whitson, *et al.*'s (hereinafter collectively "Plaintiffs")
 4 administrative motion is procedurally improper and substantively without merit. This
 5 Court has already ruled that Plaintiffs may not effect service of process on Defendant
 6 BUMBO (Pty) Ltd. (hereinafter "BUMBO-Pty") through an agent for service of process
 7 *other than* a local sheriff under Rule 4(1)(a) of the South African Uniform Rules of
 8 Court. *See* May 14, 2008 Memorandum & Order, Document No. 63, pp. 15-19 ("May
 9 14, 2008 Order.") The Court has also ruled that formulating an alternative manner of
 10 service under Federal Rule of Civil Procedure ("Fed. R. Civ. Proc.") 4(f)(3) is
 11 unwarranted based on the particularities and necessities of this case. *See id* at p. 20, lines
 12 15-18. Plaintiffs should not be permitted to circumvent the Court's May 14, 2008 ruling
 13 and forgo adequate service of process, through an administrative motion.

14 **ARGUMENT**

15 **A. AN ADMINISTRATIVE MOTION UNDER LOCAL RULE 7-11 IS AN**
 16 **IMPROPER PROCEDURAL VEHICLE FOR SEEKING RELIEF UNDER**
 17 **FED. R. CIV. PROC. 4(f).**

18 Plaintiffs' administrative motion is improper since a specific federal statute
 19 expressly governs requests for designation of an alternative manner of service.

20 Rule 7-11, "Motion for Administrative Relief," of the U.S.D.C. for the Northern
 21 District of California Local Rules states, in relevant part,

22 The Court recognizes that during the course of case proceedings a party
 23 may require a Court order with respect to miscellaneous administrative
 24 matters, *not otherwise governed by a federal statute*, Federal or local rule or
 standing order of the assigned judge. These motions would include matters
 such as motions to exceed otherwise applicable page limitations or motions
 to file documents under seal, for example.

25 Civil Rule 7-11 (*emphasis added*.)

26 Since the designation of an alternative manner of service is explicitly governed by
 27 Fed. R. Civ. Proc. 4(f), an administrative motion to designate an alternative manner is
 28

1 improper.

2 Furthermore, pursuant to Local Rule 7-10, a party may only file an *ex parte*
 3 motion, if a statute, Federal Rule, local rule or Standing Order authorizes the filing of
 4 such a motion. *See* Civil Rule 7-10; and *Universal Trading & Investment Co. v.*
 5 *Kirtchenko*, 2007 WL 295548, p. *1 (N.D. Cal. 2007) (“Civil Local Rule 7-10, which
 6 governs the filing of *ex parte* motions...requires that such motions ‘include a citation to
 7 the statute, rule or order which permits the use of an *ex parte* motion to obtain the relief
 8 sought.’”) Since no federal statute, local rule or standing order permits a motion for an
 9 alternative manner of service to be brought *ex parte*, Plaintiffs were required to adhere to
 10 the standard notice procedures outlined in Local Rules 7-2 and 7-3.

11 **B. PLAINTIFFS’ ADMINISTRATIVE MOTION IS IN TRUTH A MOTION**
 12 **FOR RECONSIDERATION OF THE COURT’S RULING ON BUMBO-**
 13 **PTY’S MOTION TO QUASH SERVICE OF PROCESS**

14 Plaintiffs’ administrative motion seeks an order from this Court allowing Plaintiffs
 15 to effect service of process on BUMBO-Pty by either: (1) serving Condon & Forsyth
 16 LLP; or (2) “...by any person hand delivering a copy of the Summons and Complaint to
 17 the office of Bumbo Pty, Ltd. in South Africa again.” Motion, p. 4, lines 5-6.

18 However, this Court has already ruled that an alternative manner of service is not
 19 warranted under these circumstances, and that the proposed method of service “by any
 20 person” is improper under South African law and, thus, Fed. R. Civ. Proc. 4(f)(2)(A).
 21 *See* May 14, 2008 Order, p.18, lines 11-14, and p. 19, lines 18-19. Because the Court has
 22 already ruled on these issues, Plaintiffs’ administrative motion is in truth, a motion for
 23 reconsideration of the Court’s May 14, 2008 ruling.

24 Absent unusual circumstances, a motion for reconsideration will not be granted
 25 “unless the District Court is presented with newly discovered evidence, committed clear
 26 error, or if there is an intervening change in the controlling law.” *Kona Enterprises, Inc.*
 27 *v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Plaintiffs have not offered any
 28 newly discovered evidence or a change in the controlling law to support Plaintiffs’
 administrative motion. The Court specifically addressed Plaintiffs’ prior request for

1 designation of an alternative manner of service in the Court's May 14, 2008 Order,
 2 holding that such a request was unsustainable because: (i) Plaintiffs had not obtained
 3 prior court approval; and (ii) the circumstances did not warrant formulation of an
 4 alternative manner of service. *See* May 14, 2008 Order, p. 20, lines 3-18. The Court
 5 stated that, unlike the defendants in those cases cited by Plaintiffs in opposition to
 6 BUMBO-Pty's motion to quash, BUMBO-Pty is not an "elusive" defendant which had
 7 striven to evade service. *See id.* at p. 20, lines 12-15. The Court stated, "in this case, the
 8 physical location of the defendant in South Africa is well-known to plaintiffs and there is
 9 no indication that defendant is trying to evade service. The particularities and necessities
 10 of this case currently do not require this court to order alternative methods of service of
 11 process." *Id.* at p. 20, lines 15-18.

12 The fact that Plaintiffs have finally contacted a South African sheriff, who has
 13 indicated that he or she will not serve the papers of a foreign court unless directed to do
 14 so by a South African legal authority in compliance with the South African rules of
 15 service of process,¹ should not alter the Court's conclusion. Plaintiffs filed the instant
 16 action several months ago on August 16, 2007. The fact that Plaintiffs have waited until
 17 May 2008 to contact sheriffs in South Africa should not serve as justification for
 18 abrogating the rules of service of process under either U.S. or South African law.² There
 19 is no evidence that the laws for service of process in the U.S. or South Africa have
 20 changed from August 2007 to May 2008. A sufficient means for serving process issued
 21 by a foreign jurisdiction exists in South Africa, and this Court has directed Plaintiffs to
 22 follow it. Plaintiffs may seek either a letter rogatory or letter of request from this Court
 23 to be presented to the appropriate court in South Africa for approval and issuance to a
 24 local sheriff. Based on Jeremy Fietz's declaration, the sheriffs of South Africa are
 25 prepared to effect service of process as directed by the courts.

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27 ¹ *See* Motion, p. 2, lines 11-17.

28 ² Plaintiffs also fail to make a sufficient evidentiary showing regarding the estimated time period for service by a local sheriff in South Africa. The Declaration of Jeremy R. Fietz does not indicate what sheriffs were contacted, when, and by whom.

**C. PLAINTIFFS' MOTION IS BASED ON A MISINTERPRETATION OF
RULE 4(1)(a)(aA) OF THE SOUTH AFRICAN UNIFORM RULES**

Plaintiffs' Motion is based on an erroneous interpretation of Rule 4(1)(a)(aA), regarding service on a party represented by an "attorney of record." Rule 4(1)(a)(aA) pertains only to the "initiation of application proceedings" in an interlocutory matter, subsequent to commencement of proceedings by way of application or summons. *See* Declaration of Jeffrey M. Bortz ("Bortz Decl."), ¶ 4. The term "interlocutory relief" under South African law means relief which is incidental to the main case. *See id.* at ¶ 5. For example, an application to combine or consolidate discovery, or an application for interim maintenance in a divorce action, would both be considered "interlocutory relief." *See id.* The parties in each of these examples would already be represented by an attorney of record in the pending action, who may be served with the initiation of application. *See id.*; *cf.* Fed. R. Civ. Proc. 5(b)(1) ("[i]f a party is represented by an attorney, service...must be made on the attorney unless the court orders service on the party.")

Moreover, the word "attorney" in the phrase "attorney of record," found in Rule 4(1)(a)(aA) means an attorney who is admitted, enrolled and entitled to practice law in one of the divisions of the High Court of South Africa. *See* Bortz Decl.), ¶ 7. Since Condon & Forsyth, LLP is not admitted, enrolled and entitled to practice in one of the divisions of the High Court of South Africa, Condon & Forsyth, LLP may not serve as the "attorney of record" on behalf of BUMBO-Pty for purposes of Rule 4(1)(a)(aA). *See id.*

**D. CONDON & FORSYTH LLP'S SPECIAL APPEARANCE ON BEHALF OF
BUMBO-PTY MAY NOT SERVE AS JUSTIFICATION FOR
PERMITTING SERVICE OF PROCESS ON CONDON & FORSYTH LLP**

Finally, the special appearance made by Condon & Forsyth, LLP on behalf of BUMBO-Pty may not be converted into an involuntary waiver of the requirements of formal service of process. Furthermore, the fact that BUMBO-Pty is aware of Plaintiffs' lawsuit does not satisfy the principles of notice underlying Fed. R. Civ. Proc. 4. As

1 pointed out by the Third Circuit in *Grand Entertainment Group, Ltd. v. Star Media Sales,*
 2 *Inc.*, 988 F.2d 476, (3rd Cir. 1993):

3 Although notice underpins Fed. R. Civ. Proc. 4 concerning service, notice
 4 cannot by itself validate an otherwise defective service. Proper service is
 5 still a prerequisite to personal jurisdiction. Inquiry into the propriety of
 6 service is separate from, and in addition to, the due process concerns
 7 present in an inquiry into the notice itself. (Citation.). A district court's
 8 power to assert *in personam* authority over parties defendant [*sic*] is
 dependent not only on compliance with due process but also on compliance
 with the technicalities of Rule 4. (Citations.) Notice to a defendant that he
 has been sued does not cure defective service, and an appearance for the
 limited purpose of objecting to service does not waive the technicalities of
 the rule governing service. (Citations.)

9 *Grand Entertainment*, 988 F.2d at 492; *see also Weston Funding, LLC v. Consorcio G.*
 10 *Group Dina, S.A.*, 451 F.Supp.2d 585, 589 (S.D.N.Y. 2006) (“[w]aiver of
 11 service,...cannot be lightly inferred. ...[n]or can defective service be ignored on the mere
 12 assertion that a defendant had ‘actual notice.’”) (Citations omitted.)

13 CONCLUSION

14 For all the foregoing reasons, Defendant BUMBO (Pty) Ltd. requests that
 15 Plaintiffs’ administrative motion be denied.

16 Dated: May 28, 2008

CONDON & FORSYTH LLP

17 By: 

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 20 Attorneys for *Specially Appearing* Defendant
 21 BUMBO (PTY) LTD.
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